IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 21.11.2007

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THE HONOURABLE MR.JUSTICE S.MANIKUMAR

Writ Petition No.19978 of 2007

M/s.Annamalai Cotton Mills Ltd.,
Rep. By its Managing Director,
P.Sundaram
Gajjainaickenpatty,
Salem-636 201. ... Petitioner

Vs.

1.The State of Tamil Nadu,
represented by its Secretary
to Government, Commercial
Tax Department, Secretariat,
Chennai-9.
2.The Commissioner Tax Officer,
Salem Rural Circle,
Salem. ... Respondents

This petition filed under Article 226 of the Constitution of India for the issuance of Writ of Certiorari to call for the records of the second respondent pertaining to the order dated 28.2.2007 in TNGST/2700104/2003-04 and quash the same.

For petitioner : Mr.N.R.Chandran
Senior counsel
for Mr.P.Sathish
For respondents : Mr.Haza Nazirudeen,
Special Government Pleader

O R D E R

The petitioner has sought for a writ of certiorari challenging the order of Commercial Tax Officer, Salem Rural Circle, the second respondent herein dated 28.2.2007 and quash the same.

2.Brief facts leading to this writ petition are as follows:

The Managing Director of the Petitioner has sworn to an affidavit and submitted that the petitioner mill suffered huge loss and therefore a reference was filed by the petitioner company to BIFR under Section 15(1) of Sick Industrial Companies Special Provisions Act on 29.7.2001 and after hearing the

objections by the creditors, the Bench of B.I.F.R. ultimately found that the company fulfilled all the criteria for declaring it as a sick company under the BIFR Act and accordingly the company was declared as a sick company by an order dated 9.7.2002 and a petition was also registered on 8.8.2003. It is further submitted that the Bench also framed guidelines for preparation of rehabilitation scheme by BIFR and the matter is still pending, however no scheme has so far been framed. The Petitioner has further submitted that since power supply was terminated due to non-payment of dues to the Electricity Board, the petitioner-company purchased a HSD, SKO (Superior Kerosene Oil) and LDO from other states and Form-C declaration were submitted as required under Central Sales Tax Act. The SKO was purchased for utilisation in the industry and there was no complaint from the Central Sales Tax Authorities for the alleged misuse of SKO (Kerosene Oil) purchased from the outside of State.It is contended that SKO was used only for the purpose of generation of electricity.

3.Due to loss suffered by the company in carrying on the business, the company was closed after 5.12.2003. It is further submitted that the second respondent caused an inspection on 9.12.2003 and perused all the records and thereafter an assessment order dated 31.3.2006 was passed for the year 2003-3004 for the tax payable on turn over of Rs.32,38,493/- and the tax of Rs.1,12,788/- was levied, which has already been paid. Suddenly, on 4.9.2006 a notice was issued by the Commercial Tax Officer Salem Rural Circle, the second respondent herein, under Section 16 of the Tamil Nadu General Sales Tax Act, proposing to revise the turn over from Rs.32,38,493/- to Rs.1,01,08,051/- and impose tax of Rs.17,43,007/- and penalty of Rs.24,45,329/-. The percentage of penalty sought to be levied was at 150 percent. On receipt of show cause notice, the petitioner filed a petition challenging the jurisdiction of the second respondent to revise the assessment without any fresh material. According to the petitioner, the revised notice was issued on the basis of the material, which was already available on record when the original assessment was made and therefore the proposed revised assessment was impermissible. Without considering the objections in the proper perspective, the Assessing Officer, the second respondent passed an order on 28.2.2007 reiterating the same details as contained in the show cause notice dated 4.9.2006, without any valid reasons.

4.It is the grievance of the petitioner that the decisions cited by the petitioner were not considered by the assessing officer. The petitioner has further submitted that though an appeal remedy is provided under the statute, since the revised assessment order has been passed in violation of principles of natural justice and without jurisdiction, considering the fact

that the petitioner is a sick unit and huge tax amount alleged to be the due and payable to the department and in view of the provisions of Section 22 of Sick Industrial companies Special Provisions Act, the petitioner is constrained to prefer this writ petition. The petitioner has further submitted that even if an appeal is preferred, the Appellate Authority may not entertain the appeal without payment of 25% of tax, and therefore the writ petition is maintainable in law and on facts.

5.The respondents in their counter affidavit submitted that the petitioners were manufacturers of cotton yarn and an assessee on the file of the second respondent. In respect of assessment year 2003-2004, the petitioners were originally assessed on a total and taxable turnover of Rs.32,38,493.00 by an order of assessment dated 31.3.2006 under the Tamilnadu General Sales Tax Act, 1959. Subsequent to the original assessment, the respondent received incriminating records along with the statements recorded on 9.12.2003 during inspection by the Enforcement Wing Officer on 9.12.2003. On the basis of the bills recovered and statements, it was prima facie found that the petitioner had effected purchase of Superior Kerosene Oil to the tune of Rs.29.16,246/-. In the absence of proportionate quantity of production of cotton yarn in correlation to the quantity of raw materials purchased viz., Superior Kerosene Oil, it was proposed to treat the Superior Kerosene Oil to be sold locally without using the same in manufacturing purpose. Further, from the check-post bills received from the check-post officer, it was found that several other purchases of Superior Kerosene Oil had not been accounted for in the records maintained by the petitioner. Hence, a pre-revision notice dated 4.9.2006 was issued proposing to assess the escaped turnover. On receipt of the said notice, the petitioner filed their objections by their letter dated NIL, which was received in the office on 29.12.2006. By letter dated 18.1.2007, the petitioners were called upon to appear on 31.1.2007 at 3 P.M. for a personal hearing along with relevant records. At the time of personal hearing, one Thiru Balaji, Accountant incharge of the petitioner company furnished a statement to the effect that the petitioner had been running the mill only by using diesel generator and Superior Kerosne Oil purchased locally and also from other States, for generating electricity in production of yarn and for company's lighting purpose. Taking into consideration of the available records, statements recorded during inspection and the statement furnished by the representative of the company, a revised order of assessment was passed on 28.2.2007 confirming the proposal and consequently the total and taxable turnover was redetermined at Rs.1,01,08,051/-.

6.The averment that the order of original assessment dated 31.3.2006 was issued only after perusal of the records recovered

during inspection is denied. The respondents further submitted that at the time of passing of the original assessment, the records recovered by the Enforcing Wing Officers on 9.12.2003 were not available for consideration and the same were received in the office only subsequent to the order of the original assessment. Therefore, the contention of the petitioner that revision of assessment was made on the basis of the same materials and not on fresh material is incorrect. On the other hand, the materials relied on for revising the assessment was only based on the fresh materials made available by the Enforcement Wing and as such the impugned proceedings cannot be characterised as having been passed on mere change of opinion.

7.It is further submitted that the invoices recovered disclosed purchases made prior to 5.12.2003, the date when the company stopped functioning. Records were recovered from the premises of the petitioner company and therefore the allegation that the respondent has acted on the basis of materials not disclosed to the petitioner is improper. The respondents further submitted that the burden of proving that the particular transaction is not liable to tax is on the dealer and in the absence of production of sufficient evidence by the dealer, the assessing authority is well within his jurisdiction to arrive at the conclusion that sale had been effected in respect of un-utilised materials. As regards the status of the petitioner, it is submitted that though the petitioner company had been declared as sick, pendency of the proceedings cannot have any bearing on the right of the petitioner to pursue its statutory remedy by way of an appeal under Section 31 of the Tamilnadu General Sales Tax Act, 1959 and merely because, the petitioner is unable to fulfil the pre-condition of payment of 25% of the disputed tax, recourse to writ remedy is not permissible. The respondent has further submitted that as the revision of assessment does not suffer any lack of fundamental jurisdiction or procedural violation of natural justice and as the matter involves question of fact, the subject matter can very well be agitated before the appellate authority. The respondents have further contended that the petitioner had not sufficiently disclosed the status of the pending proceedings before the BIFR with supporting evidence. For all these reasons, the respondents have prayed for dismissal of the writ petition.

8.Mr.N.R.Chandran, learned counsel for the petitioner submitted that the original assessment was made on 31.3.2006 after inspection on 9.12.2003 and the total turn over was assessed at Rs.32,38,493/- and the tax due on the turn over of Rs.1,12,88.00 was also paid. He further submitted that as the show cause notice dated 4.9.2006 did not contain any fresh material, the revision of assessment under Section 16 of the Act is not permissible and as the revenue has failed to produce the

materials on the basis of which, steps were taken to revise the assessment, the authority has patently erred in exercising his revisional jurisdiction for arriving at its conclusion on the same set of facts that were available at the time of original assessment.

9.Learned senior counsel for the petitioner further submitted that the allegation of the department that the oil purchased from other states has not been utilised for the purpose of running the industry and its alleged diversion has not been established by the department. The conclusion of the department that SKF oil purchased by the petitioner has not been properly accounted for is not based on any records and it is purely on hypothetical consideration. He further submitted that the assessment of the 2nd respondent that inasmuch as the petitioner has failed to account for the oil purchased on 19.11.2003 and therefore the dealer would have sold all the SKO oil without being utilised is fallacious.

10.Placing reliance on the decisions in Tata Devy Ltd. -Vs .- State of Orissa and others reported in 1997(6) SCC 669; in Deputy Commercial Tax Officer and others vs. Corromandal Pharmaceuticals and others reported in 1997 (10) SCC 649; in Sri Vadivambigai Textiles Mills Ltd., Sakkanthi, Sivaganga Pasumpon Muthuramalinga Thevar District, Tamil Nadu-623 560 vs. The State of Tamil Nadu rep. by the Secretary Revenue Department Fort St. George Chennai and another reported in 2002 (1) CTC page 288, learned Senior counsel submitted that as arrears of tax is not recoverable from a sick industry, recourse to alternative remedy is not efficacious and as there is lack of jurisdiction and violation of natural justice attracting wednesbury principles, the writ petition is maintainable in law. He also relied on a decision of the Division Bench of the Bombay High Court in Yeshwant Gajanan Joshi and others v. The Hindustan Petroleum Corpn. ltd. and another reported in AILR 1988 Bombay 408 for the proposition that alternative remedy provided in the Statute is not a bar for invoking writ jurisdiction.

11.On the other hand Mr.Mahadevan, learned Additional Government Pleader reiterated the counter affidavit and submitted that the original assessment dated 31.3.2006 was made without reference to the records recovered by the Enforcement Wing. Upon receipt of the materials and statements recorded on 9.12.2003, a revised show cause notice was issued. He submitted that when all the records were unearthed from the business premises of the petitioner, it is not open to the petitioner to contend that the materials were not disclosed. Learned counsel for the respondents further submitted that once incriminating materials are recovered during inspection, it is always open to the assessing officer to revise the assessment under Section 16 of the TNGST Act and in

the absence of correlation of quantity of production, with the purchase of SKO oil, the authority can always come to the conclusion that the SKO oil purchased had been sold locally by the petitioner. Learned counsel for the State further submitted that whenever the assessing officer records his findings on the basis of fresh materials, the same cannot be termed as change of opinion. On the issue of proceedings pending before the BIFR, learned counsel submitted that the same is not a bar for invoking the appellate jurisdiction and inasmuch as the authority is competent to take action under the Statute, there is lack of jurisdictional error and therefore, the petitioner cannot bypass the alternative remedy provided under the Act. As the issue of jurisdiction can also decided by the appellate authority, recourse to writ petition is not permissible and hence prayed for dismissal of the petition.

12.Heard, Mr.N.R.Chandran, learned Senior Counsel for Mr.P.Sathish for the petitioner and Mr.Mahadevan, the learned Additional Government Pleader for State and perused the materials available on records.

13.The original assessment order is not enclosed in the typed set of papers. It is evident from the pre-revision notice dated 4.9.2006 that the place of business of the dealer was inspected on 9.12.2003 and the following were noticed:

> "They purchases polyester waste from local market and manufacture them as polyester yarn in their own mill and made local sales only. No inter-state or consignment sales. No.E.B. connection for the past 3 years. They having 3 generators for production of electricity power by using S.K.O.. They purchases S.K.O. from inter-state Dealers by the issue of 'C' Form. They have temporarily stopped production w.e.f. 5.12.2003. The following defects were noticed during inspection:-
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> 1)Day Book, Ledger, 'C' Forms, Form-F, etc. for the current year not produced for inspection.
> 2)Previous year account books were also not produced.
> 3)The following 2nd sales of Textile Machinery were made in July 2003. But no RST was paid along with the return."

14.In so far as interstate purchase, which were improperly accounted, the dealer had accepted the omission and promised to pay the tax within a week before the inspection officer and summons were issued on four different dates. The dealer did not produce any regular accounts. The assessing officer on comparison

of the production details with that of SKO oil purchase, prima-facie found that the entire quantity of oil was not utilised only for the purpose of generating electricity and running the mill. Apart from the above, the petitioner has not paid the resale tax on the sales of textile machinery i.e. the tax amount of Rs.4000/-. The check post bill No.018820 dated 19.11.2003 as reflected in the impugned order would go to show that the dealers have purchased SKO Oil, but omitted to account for and the same had been accepted at the time of inspection. Therefore the contention of the petitioner that there was no material for revision of assessement is factually incorrect. The power to initiate revision of assessment for determination of escaped turnover on the basis of fresh materials is conferred on the assessing authority under the Statute and therefore the notice proposing the revise the assessment does not suffer from lack of jurisdiction. It is evident from the impugned order that the petitioner has failed to pay resale tax on the sales of textile machinery and the purchase of SKO oil on 19.11.2003 was also not accounted for. The assessing officer has also recorded the fact that the quantity of oil purchased does not correlate with the production of yarn.

15.Whether the transaction effected on 19.11.2003 and earlier, are liable to tax or not has to be proved by the dealer before the authority with sufficient evidence and documents and this court cannot convert itself as an appellate authority to re-appreciate the evidence. The finding that there is an escaped turn over on the basis of fresh materials cannot be termed as totally perverse warranting interference.

16.The judgements relied on by the learned Senior Counsel in 1)(1997) 6 Supreme Court Cases 669; 2)(1997)10 Supreme Court Cases 649; and 3) in 2002 (1) CTC page 288, relate to recovery of tax and the same are not applicable to the facts of the case where the authority had revised the assessment on the basis of fresh materials.

17.As rightly pointed out by the learned Government Pleader the stage of the pending proceedings before BIFR is not clear in the affidavit filed in support of the writ petition. Even assuming that proceedings are pending before BIFR, pendency of the proceedings does not preclude the assesee from filing an appeal under Section 31 of the Tamilnadu General Tax Act 1959. It could be noticed that though the dealer claims to have been declared as Sick by BIFR, on the basis of their application dated 29.7.2001, the dealer had paid tax of Rs.1,22,788/- and this order dated 31.3.2006, the taxable turnover was assessed at Rs.32,38,493 for the assessment year 2003-2004, which clearly demonstrate that there was substantial business. The decision relied on by the learned Senior counsel for the proposition that

alternative remedy is not a bar and the principle as evolved by the Division Bench of the Bombay High Court in Yeshwant Gajanan Joshi and others vs. The Hindustan Petroleum Corpn. Ltd. and another reported in AIR 1988 Bombay 88 is as follows:

"18.Mr.Pai thereafter canvassed the view that alternative remedy is provided by the Act itself and this court, in exercise of its jurisdiction under Article 226 of the Constitution of India, should not set aside the award of compensation which could have been got modified by the Corporation by approaching the District Court. Though the existence of an alternative remedy is sometimes held as a bar to the invocation of the jurisdiction of this Court under Article 226 of the Constitution, it is not an absolute bar. On the other hand, it is subject to certain well established exceptions. If, for example, an order passed or an award made is a nullity, it can be challenged on that ground directly under Article 226 of the Constitution. As early as in Baburam Prakash Chandra v. Antarim Zila Parizhad, AIR 1969 SC 556, the Supreme Court pointed out as follows:-

> "There are at least two well-recognised exceptions to the doctrine with regard to the exhaustion of statutory remedies. In the first place, it is well settled that where proceedings are taken before a Tribunal under a provision of law, which is ultra vires it is open to a party aggrieved thereby to move the High Court under Article 226 for issuing appropriate writ for quashing them on the ground that they are incompetent, without his being obliged to wait until those proceedings run their full course ..... In the second place, the doctrine has no application in a case where the impugned order has been made in violation of the principles of natural justice".
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> An order which is nonest on account of the violation of the basic principle of natural justice, namely, audi alteram partem need not be even appealed from. See Hussein Miya Dosnmiya v. Chandubhai Jethabai, 55 Bom LR 946: (AIR 1954 Bom 239). It can be challenged at any time even by way of defence as has been done in the present case. Even if one regards the application to the District Court as an appeal, the existence of the provision of appeal does not wash away the original sin of the infraction of the rule of natural justice. Even in the administrative field it has now been held that if natural justice is violated at the first stage, the

right of appeal is not so much a true right of appeal as a corrected remedy. In such a case right of appeal is not a right of appeal at all. The Supreme Court in the case of Institute of Chartered Accountants of India v. L.K.Ratna, AIR 1987 SC 71, has referred to certain passages in Wade's Administrative Law and the observations of Megarry, J. In Leary v. National Union of Vehicle Builders (1971) 1 Ch 34, in this regard. The following from the observations of Megarry, J. May profitably extracted again here:--

"If the rules and the law combine to give the member the right to a fair trial and the right of appeal, why should he be told that he ought to be satisfied with an unjust trial and a fair appeal."

19.In a recent judgement the Supreme Courtin Star paper Mills Ltd. v. State of U.P. And others reported in (2006) 148 STC 0144, considered the issue relating to entertaining the writ petition where alternative remedy is available under the statute and held as follows:

"The rule relating to the existence of an alternative remedy is a self imposed limitation adopted by High Courts. It is essentially a rule of policy, convenience and discretion as is not a rule of law. Despite the existence of an alternative remedy it is within the jurisdiction of the High Court to grant relief under article 226 of the Constitution of India. At the same time, though the matter relating to an alternative remedy has nothing to do with the jurisdiction of the court, normally the High Court should not interfere if there is an adequate efficacious alternative remedy. The court, in extraordinary circumstances, may exercise the power if it comes to the conclusion that there has been a breach of principles of natural justice of the procedure required for decision has not been adopted."

20.As regards the contention of violation of principle of natural justice, it is evident from the material on record that pursuant to the inspection conducted on 9.12.2003, summons were issued on four occasions to the dealer to produce accounts, but they have failed to appear to show their bonafide. The objection of the petitioner dated 29.12.2006 and the statement of the representative of the dealer dated 31.1.2007 were considered by the second respondent, the assessing officer, before arriving at

conclusion that there was an escaped turnover warranting imposition of additional tax liability and penalty.

21.In the light of above said Supreme Court judgement and considering the facts with the material on record, I do not find that the petitioner has made out the case of total lack of jurisdiction or violation of the principles of natural justice. The revision assessment is based on certain facts which were noticed during inspection, for which explanation was obtained and considered by the authority. It is settled law that High Court does not entertain Writ petitions, where the petitioner has an alternative remedy under the Statute and the court does not act as court of appeal against order of the competent authority to correct errors on facts, if any. The machinery created by the statue is for the purpose of adjudicating both facts as well as law and the High Court has to decide purely on the question of law and infringement of statutory rights. Recourse to writ petition without availing alternative remedy would be amounting to bypassing the statutory remedy to adjudicate the factual question as to whether there was proper utilisation of SKO Oil purchased by the dealer is nothing but re-appreciation of evidence. The question of law raised in the decision reported in CDJ 2006 Madras High Court 910 was whether, the Sales Tax Appellate Tribunal was right in approving the reappreciation of the evidence made by the first appellate authority, dislodging the cogent and convincing reasons given by the assessing officer. The facts relate to an estimation of sales on the basis of turnover of one day sale and the same was held to be not a scientific method. The said decision is altogether on a different set of facts, where this court held that the method adopted by the authority to estimate the sales turnover was on hypothetical consideration. On the contrary in the present case on hand, the 2nd respondent on the basis of the materials recovered from the business premises, statements recorded, check-post bill dated 19.11.2003 found that purchase of oil did not correlate with the production quantity of yarn and arrived at the conclusion of escaped turnover. It is not a case of hypothetical consideration and therefore in my considered view, the judgement is not applicable to this case.

22.In the result, I do not find that the impugned order suffers from any lack of jurisdiction, perversity in finding and there is no violation of natural justice. Hence the writ petition is dismissed. No costs.

Vk

Sd/

Asst.Registrar

/true copy/

Sub Asst.Registrar

To

1.The Secretary
to Government, Commercial
Tax Department, Secretariat,
Chennai-9.

2.The Commissioner Tax Officer,
Salem Rural Circle,
Salem.

+ 1 cc to Mr. P. Sathish, Advocate SR No. 69229
+ 1 cc to Special Government Pleader (Taxes) High Court, Madras.104

SP(Co)
SR/29.11.2007

W.P.No.19978 of 2007